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No. 08-1450

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LAVON JONES, JR.,

Petitioner,

v.

BAYER HEALTHCARE LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Do the challenged decisions of the District Court and Ninth Circuit, properly applying long-standing jurisprudence in granting summary judgment in favor of Respondent in a garden-variety employment discrimination case, call for re-examination of summary judgment principles in the context of employment discrimination suits in total, where there has not even been error shown below?

II. Should this Court grant review to consider amending Federal Rule of Civil Procedure 56 to create a special rule for employment discrimination cases?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Bayer HealthCare LLC is a wholly owned subsidiary of Bayer Corporation, an Indiana corporation. Bayer Corporation is a wholly owned subsidiary of Bayer AG, a German corporation whose shares are publicly traded on the Frankfurt exchange.

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STATEMENT OF THE CASE

A. Nature of the Case

Petitioner Lavon Jones, Jr. (herein, "Petitioner") contends that respondent Bayer HealthCare LLC (herein, "Respondent" or "Bayer") discriminated against him in the terms and conditions of his employment as an HVAC (Heating/Ventilation/Air-conditioning) mechanic by treating him disparately and less favorably than non-African-Americans in a variety of matters, including training, the provision of tools, and the supply of uniforms. Petitioner claims that Respondent ultimately denied him a promotion and terminated him because of his race and in retaliation for his protests and his oppositional protected conduct. The United States District Court for the Northern District of California, the Honorable Jeffrey S. White presiding (herein, the "District Court"), granted summary judgment for Respondent and the Ninth Circuit Court of Appeals affirmed and, later, denied *en banc* review. Petitioner now seeks United States Supreme Court review by his within Petition for Writ of *Certiorari* (herein, the "Petition").

B. Statement of Relevant Facts

1. Bayer's Hematology/Cardiology Global Business Unit

The Bayer site at which Petitioner worked in Berkeley, California houses Respondent's Hematology/Cardiology Global Business Unit and employs approximately 1,500 workers. The site is involved in the

research, development, and production of finished pharmaceutical products, including Kogenate FS. Kogenate FS is a drug principally used by hemophiliacs to help clot their blood; it is a life-sustaining and, in some cases, a life-saving product. (ER[1]/496-497.)

Bayer, as a producer of finished pharmaceuticals for human use, must follow rigorous internal Standard Operating Procedures ("SOPs") that are consonant with Good Manufacturing Practices ("GMPs") which, in turn, are mandated by applicable provisions of the United States Code of Federal Regulations and parallel regulations of comparable European regulatory agencies and of other regions of the world. Bayer's practices and processes in this regard are subject to scrutiny and review by the United States Food and Drug Administration ("FDA"), and like agencies in other nations. Prominent among these regulations are requirements of vigilant self-policing, including with regards to accurate manufacturing documentation. (ER/497, ¶ 5; ER/615:20-616:9.) If a regulatory audit were to uncover inaccurate record-keeping at the Bayer Berkeley site, it could lead to monetary sanctions or even a suspension of production, threatening business sustainability, Bayer's ability to employ its large, local work force and, most importantly, the health, safety, and welfare of its patient community. (ER/497, ¶ 5.)

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[1] "ER" refers to Excerpts of Record as submitted by Petitioner to the Ninth Circuit.

2. Petitioner Is Hired and Understands his Bayer employment Is Governed by Certain Rules of Conduct

Petitioner was offered and accepted a position as a General Worker for Bayer, starting in February 1997. (ER/575:4-9.) His duties in this position were janitorial in nature. (ER/584:14-58:5.) He had no HVAC duties. (ER/585:6-14.)

Petitioner was subject to the terms and conditions of his Bayer Company agreement, which, *inter alia*, obligated him to follow Company rules, policies and procedures. (ER/580:21-582:9; ER/1041-1044 (*esp.*, ¶ 13).) Petitioner also understood that he was required to follow certain "Company Rules." (ER/582:10-583:14; ER/503, 508-510[2]; ER/1045-1047.) These rules included prohibitions on:

- using any abusive or profane language to any supervisor, employee or visitor (ER/1045-1047, p. 2, ¶ 12, left column)
- unauthorized absenteeism or tardiness or failure to promptly report the reasons for such matters (*id.* at ¶ 14, left column)
- failing to observe safety rules and regulations (*id.* at ¶ 6, right column)
- falsifying personnel or medical records (*id.* at ¶ 8, right column)

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[2] ER/509 is mis-stamped ER/638 on the ER as served on Respondent's counsel.

- refusing or failing to perform [a] job as assigned by supervisor (*id.* at ¶ 14, right column).

Petitioner understood he could be terminated for violating these rules. (ER/1045-1047.)

3. Bayer Promotes Petitioner and Pays for his Technical Education

In August 1999, Petitioner enrolled in the Sequoia Institute. (ER/592:17-593:1.) Bayer paid all of Petitioner's tuition at Sequoia. (ER/593:2-6.) On or about September 8, 2000, Petitioner completed a low-grade Climate Control and Refrigeration Technology Program at Sequoia. (ER/593:18-595:21; ER/1049-1053.) This was the only HVAC training Petitioner ever had and he had no HVAC work experience at the time of his matriculation. (ER/595:22-596:18; ER/597:7-24.)

4. Petitioner Has an Extensive History of Interpersonal and Performance Problems at Bayer, Including at Least One Conflict with an African-American Co-worker

Throughout his Bayer employment, there were numerous incidents where Petitioner's poor interpersonal skills affected his work environment. For example, in a dispute between Petitioner and employee Michael Timberlake, also African-American, Petitioner was accused of spreading rumors and gossiping about Timberlake. Timberlake sent Petitioner an e-mail requesting he not engage in such conduct; they both then met with HR representative Sherri O'Driscoll (then

Vierra) and ultimately resolved the issues. (ER/589:11-592:16; ER/1048.)

5. Petitioner Is Selected to Be an HVAC Mechanic-C; Later Promoted to B-Level

In October 2000, shortly after receiving his certificate from Sequoia, Petitioner applied for an HVAC-C level position. (ER/610:2-611:2; ER/1066-1069.) He understood this to be an entry level, apprentice position; the lowest in the department. (ER/611:21-25; SER[3]/001:1-2.) Part of the assessment process for the hiring supervisor, Ron Roberts, was to measure the ability of each candidate to absorb and retain information as this was to be a position that would entail a significant learning curve. (ER/515, ¶ 3.)

Petitioner was hired into the C-level position, notwithstanding the HVAC Department's serious concerns with his competencies for the job based on his inability to demonstrate he had retained any of his training at Sequoia. (ER/608:18-609:3; ER/515, ¶ 4.) In connection with this hiring process, and in all of his dealings with him, Petitioner had no memory of Roberts ever making any derogatory remark concerning Petitioner's race or that of any other employee. (ER/612:23-613:23.) Petitioner was later promoted to a B-level mechanic position at the instance of Richard Smith, who succeeded Roberts as the department supervisor. (ER/532, ¶ 5; ER/538; ER/654:24-656:9.)

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[3] "SER" refers to Supplemental Excerpts of Record as submitted by Respondent to the Ninth Circuit.

6. The Crucial Importance of the HVAC Systems at the Berkeley Site

Respondent's pharmaceutical manufacturing process is dependent upon certain production steps being conducted in "clean room" environments as achieved, in part, through its HVAC systems. A clean room environment is one with exceptionally low levels of particulates, dust, germs, and other potential contaminates. This helps ensure the manufacture of contaminate-free drugs that are safe for human use. (ER/516, ¶ 5.)

The HVAC systems and the mechanics who maintain them are thus critical in Respondent's production processes and to ensure compliance with regulatory authority, GMPs, and Respondent's own SOPs. Indeed, if the HVAC systems malfunction, production may be stopped. On a more drastic level, a poorly maintained or poorly functioning HVAC system could jeopardize the sale and distribution of the Kogenate FS product line to patients as a result of product contamination. For many patients, this is a life sustaining drug, for which they have few (if any) alternatives. Thus, a significant HVAC issue could impact patient health as well posing business and other economic consequences to Respondent. (ER/516, ¶ 6.)

7. Petitioner Was Extensively Trained in the Requirements of Accurate Record-keeping, Safety Protocols, and Other Important Requirements of the HVAC Mechanic Position

Petitioner was provided extensive training on the requirements and importance of accurate record-keeping. (ER/614:1-622:10; ER/1070-1072; Appellee's Supplemental Excerpts of Record – *Under Seal* ("Sealed Excerpts"), SER/287-304.) Petitioner understood that a failure to adhere to Bayer SOPs could, under certain circumstances, lead to termination. (ER/622:11-623:14.)

In addition, among the most fundamental safety processes on which Petitioner was trained and qualified, were the steps involved when an HVAC mechanic services or maintains a piece of production equipment (*i.e.*, HVAC equipment that is used in or concerning site facilities where product is actually being manufactured as opposed to equipment not integral to such systems). One such fundamental process involves the equipment "release" from the local production supervisor to the mechanic. This release ensures critical notification to production personnel and approval that certain equipment will be out of service for repair/maintenance. Bayer has a specific training protocol for this step upon which Petitioner was trained and qualified. (ER/623:15-625:2; ER/1073; ER/626:20-628:11; ER/651:9-653:16; Sealed Excerpts, SER/305-308; ER/516, ¶ 7.)

In addition, following the production release of the equipment to the mechanic, the mechanic must comport with what is known as the "Site Lockout/Tagout

Procedure." This procedure, which is required for the mechanic's own safety, involves disconnecting any "hot" (electrically charged) unit that is to be worked on and physically placing a lock and tag on the unit so that it cannot be re-connected until the maintenance or service is complete. Petitioner was trained and qualified on this procedure as well. (ER/625:3-630:19; ER/1074-1083; ER/516-517, ¶ 8; ER/520-527.)

8. In His Relatively Brief HVAC Tenure, Petitioner Has Numerous Inter-personal Problems with Co-Workers, Violates Critical Policies and Standards, Is Insubordinate, and Is (Unsurprisingly) Lawfully Terminated for These Reasons

a. Petitioner's Rocky Probationary Period

At the time of his hire into the HVAC Department, Petitioner was the only C- level mechanic. (ER/631:23-632:6.) He began working in the department in February 2001. (ER/630:20-23.)

Within his first 60 days, several of the senior HVAC mechanics came to department supervisor Roberts to report challenges that they were experiencing with Petitioner, including his: (a) lack of concentration on instructions, (b) disengagement from the process, where he seemed to drift in and out and, as noted by supervisor Roberts, frequently did not even make eye contact during instruction, (c) lengthy disappearances when sent to retrieve tools and parts, and (d) excessive use of phones and beepers for personal matters. Roberts met with Petitioner to discuss these issues and he suggested

there might be some classes that he could arrange for Petitioner to improve his inter-personal dealings with the group; Petitioner refused, instead requesting a meeting with the group to which Roberts agreed. (ER/517; ER/633:19-636:22.)

At the meeting, which Petitioner attended with his Union representatives, several of his co-workers raised issues with Petitioner's lack of focus and use of cell phones, among other things. (ER/636:20-639:15.) At his deposition in this matter, Petitioner had no factual basis – just his own inferences and feelings – for concluding that this criticism was the product of a discriminatory motive. (ER/639:16-641:3.)

Because of the issues that had arisen in the department, it was offered to Petitioner that he could extend his 75-day probationary period without any formal documentation of his noted performance deficiencies; it was also suggested that Petitioner take an interpersonal skills class. (ER/517, ¶ 10.) Petitioner declined these options at which point he was formally taken off of probation and counseled by his management and Human Resources relative to the issues that had been addressed with him. (ER/642:23-650:3; ER/1084; ER/517, ¶10.)

b. Petitioner Has a Loud, Profane Altercation with a Co-worker

On or about November 8, 2001, Joe Haberstroh, a seasoned HVAC mechanic, reported a loud, profane altercation he had with Petitioner. At Smith's request, Haberstroh prepared a written summary of the events.

(ER/532-533, ¶ 6, ER/540.) Haberstroh reported in addition to the confrontational, profane (Petitioner reportedly called Haberstroh a "motherfucker" at least three times), and threatening nature of the interchange, that he had to remind Petitioner relative to compliance with the site Lockout/Tagout procedure before working on a "hot" fan unit. Smith asked Petitioner (more than once) to also submit a written account of events but he failed to do so. (ER/532-533, ¶ 6; ER/662:20-663:1.)

A meeting was convened among Smith, Roberts (who was still a "consultant" to the group and occasionally facilitated on personnel matters), and Haberstroh, along with Petitioner and his Union representatives. (ER/663:13-664:1.) At the meeting, Petitioner again refused to acknowledge any fault in the confrontation. Additionally at the meeting, Smith revealed that one of the reasons that another senior mechanic, James Rowe, had recently left the department was that he did not wish to work with Petitioner any longer and Smith was concerned about any further losses of senior mechanics in the department. (ER/664:2-665:23; ER/533, ¶ 7; ER/542-543.)

c. Petitioner Is Counseled for His Failure to Follow Equipment Release and Lockout/Tagout Procedures

In early November 2001, Petitioner was assigned to replace a drive belt on an exhaust fan. Petitioner completed and certified the work order without indicating that there had been a release of the equipment from production or any indication that there had been compliance with the Lockout/Tagout

procedure. (ER/656:10-661:14; ER/1085-1086.) Petitioner was counseled for his failure to comply with these important procedures, which could have jeopardized Respondent's product and Petitioner's safety. (ER/533, ¶ 8; ER/545-546; ER/666:8-669:8, ER/1087-1090.) At the time of this counseling, Petitioner denied that he had failed to comply with the procedures, instead claiming that he had in fact complied but that he just had no way to prove it. (*Id.*)

d. Petitioner Fails to Show up for Critical Work Assignment on January 6, 2003 after Working Unauthorized Double Time the Prior Evening; He Is Suspended for Three Days as a Result

On December 26, 2002, Petitioner was assigned to a work crew to do some preventative maintenance on Building B60 during the winter shutdown. It was explained to Petitioner (and the crew) that the work would span five days and would require 3:00 a.m. start times. Petitioner was given a schedule of the work activities and raised no objection as to the assignment. (ER/670:13-672:4; ER/533, ¶ 9.)

On January 5, 2003, a Sunday, Petitioner was scheduled to work eight hours. Without any express authorization, he worked an additional three hours – earning double time. Petitioner attempted to justify the excess hours being worked, stating that he stayed to complete some open work orders, though no one had requested the work orders be completed that day. (ER/672:5-676:21; ER/1091; ER/534, ¶ 10.) He understood that weekend overtime needed to be approved by the supervisor. (ER/670:7-12.)

The following morning, January 6, 2003, Petitioner was scheduled to participate – as part of the previously scheduled winter shutdown work - in a timed procedure involving the maintenance of an air handler unit which procedure was to begin at 3:00 a.m. With a timed procedure such as this, it is critical to have all assigned members of the team present as the failure to meet the time conditions may lead to the issuance of a Discrepancy Event Report ("DER" – now commonly called in the industry an "IR" – Incident Report); a DER/IR can cause regulatory issues and is deemed a serious matter by Bayer, which Petitioner also understood. (ER/534, ¶ 11; ER/678:19-679:12.) Instead of reporting to work on time, Petitioner left a voice mail message on Smith's cell phone indicating he was not coming in at 3:00 a.m.; that he would be in at his "regular time" – 7:00 a.m., not because he was ill or on account of other extenuating circumstances, but because he did not feel as if he should have to work his scheduled shift due to his seniority. (ER/676:22-678:18.) Smith did not play the voice mail until 5:00 a.m. and he was, unsurprisingly, unable to replace Petitioner on the shift; the short-handed crew barely completed the work on time. (ER/534, ¶ 12.)

On January 7, 2003, Petitioner was issued a three-day suspension for the failure to attend to his work duties and for working unauthorized overtime. (ER/677:4-681:20, ER 1092.) Although Petitioner stated he *believed* that his race had led to the imposition of this discipline, he could not identify anyone who had been treated more favorably by Bayer under comparable circumstances. (ER/682:3-683:23.) Nor could Petitioner

identify any facts which would establish that the discipline was in retaliation for any legally protected activity. (ER/684:8-18.)

e. Petitioner Abandons a Work Assignment on January 24, 2003

On January 24, 2003, Petitioner was required to assist two other mechanics with a process involving a tunnel sterilizer unit. He unilaterally determined the job did not require his participation. Without prior supervisor approval, Petitioner left his co-workers alone on the task for a meeting he had set up with HR. (ER/692:4-694:9.) Yet, Petitioner nonetheless advised HR Consultant Joe Gallagher that his supervisor had authorized the meeting. (ER/500, ¶ 5; ER/534, ¶ 13.)

f. In January 2003, Petitioner Approaches Supervisor Smith about the Possibility of a Further Promotion; in Evaluating this Request, the Company Learns that Petitioner Has Improperly Recorded the Completion of Work, a Serious SOP Violation which, in Context with Petitioner's Entire Bayer Work History, Leads to His Lawful Termination

In January 2003, Petitioner made an inquiry of Smith regarding a possible further promotion. (ER/685:4-20; ER/686:22-688:1; ER/1093.) In order to evaluate Petitioner's request, Smith determined, *inter alia*, to examine some recent preventative maintenance work Petitioner had been assigned, including filter change-outs. Smith did a visual

inspection of the area and determined that the filters on one fan unit had not been changed; he then pulled the paper work and saw that Petitioner had closed a work order, submitted his time entry and completed a log book indicating the work had been performed on January 24, 2003. (ER/688:22-691:2; ER/1094-1096.) Smith also determined that there were not enough filters checked out of inventory supply for the month for Petitioner to have completed the change out. (ER/291:10-293:7.) When questioned by Smith, Petitioner stated he had changed the filters and completed the documentation accordingly. (ER/534-535, ¶ 14.) At deposition, Petitioner could not account for the fact that there were dirty filters in the unit when his paperwork indicated to the contrary. Despite repeated questioning, Petitioner would *not* attest that he had in fact changed the filters. (ER/698:2-699:12; ER/1094-1095.)

At deposition, Petitioner also conceded that completion of a work order for work not done would be an instance of document falsification and a violation of Bayer policy. (ER/697:23-698:1.)

Smith advanced the issue and conferred with HR Consultant Gallagher. The two discussed the history of Petitioner's Bayer employment, his past disciplinary problems, including interpersonal issues and the three-day suspension of a few weeks earlier, his abandonment of job duties only days before, and the serious documentation violation relative to the building maintenance which would not have otherwise been discovered (were it not for Smith's inspection) and could have led to a compromised production environment.

Under all of the facts, it was determined that Petitioner's employment would be terminated. Gallagher and Smith also consulted with Joe Nitz, the superintendent over the maintenance group (which included the HVAC Department), who approved of the termination decision in consultation with then Department Manager Enrique Martinez. (ER/535; ER/548-549; ER/500-501; ER/529; ER/513, ¶ 3.)

Petitioner testified that he thought the unfulfilled promotion request and the termination were both racially motivated but – again – could not identify any statements, comments, or actions that would indicate or suggest a racial motive for the actions; only his own interpretation of the facts. (ER/695:17-696:14; ER/700:19-707:1.) Nor could Petitioner identify any evidence indicating a retaliatory motive on Bayer's part. (ER/759:1-777:17, ER/1097-1127.)

9. Petitioner Was Treated Equally with Respect to All Terms and Conditions of his Bayer Employment

Petitioner was provided equal access to tools, overtime, training, computer access, and promotion – and subject to discipline - pursuant to Bayer policy and business needs; no allocation of such was on the basis of race. (ER/501, ¶ 7; ER/513, ¶ 4; ER/517-518, ¶ 11; ER/535, ¶ 16; ER/530, ¶ 6.)

10. Petitioner Files EEOC Charge Alleging Discrimination in Terms and Conditions of Employment; Charge Is Found Without Merit; Petitioner Seeks Reconsideration and EEOC Upholds Findings that Petitioner Has No Evidence of Race Discrimination

On June 24, 2002, Petitioner filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC), alleging that he had been discriminated against in the terms and conditions of his Bayer employment on account of his race. (ER/1135.) On December 16, 2002, the EEOC dismissed the Charge, finding a lack of any evidence to sustain a violation. (ER/1132.) Also on December 16, 2002, Petitioner filed additional, voluminous materials with the EEOC (SER/002-262); because the deadline for submissions had passed, the EEOC treated the submission as a request for reconsideration. (ER/1128-1130.) On January 29, 2003, the EEOC affirmed its earlier finding that Petitioner had failed to establish any cognizable discrimination on Respondent's part. (ER/778:13-779:19; ER/780:6-781:2; ER/1128-1132.)

C. The District Court's Grant of Summary Judgment in Respondent's Favor

On November 3, 2006, Respondent moved for summary judgment. Its Motion was granted on March 21, 2007. (Appendix B to Petition ("App. B") at 26.)

The District Court determined that there was no triable issue of fact on Petitioner's first, third, fifth, and sixth claims for relief wherein Petitioner alleged that

he had been denied promotion and ultimately terminated on account of his race. Bayer established that Petitioner could not even make out his minimal *prima facie* case. Petitioner offered no proof he was competently performing his position (or suited for a promotion) at the time of the challenged employment actions. Indeed, the undisputed evidence was that he had (1) been involved in confrontations with co-workers and reprimanded for poor attitude, attendance and performance, (2) unilaterally determined not to show up for work for a critical time-controlled maintenance procedure, (3) left a job assignment without supervisor approval, and (4) failed to comply with employer-mandated documentation policies pertaining to HVAC maintenance. In addition, Petitioner adduced no evidence that anyone similarly situated as he – but outside of the protected class - had been dealt with in a more favorable way by Respondent. (App. B at 12-19.)

Even had he made a *prima facie* race discrimination showing, Petitioner was unable to present meaningful evidence of pre-text or discriminatory intent to refute Bayer's showing of legitimate bases for not promoting him, for terminating him, and for other claimed discriminatory employment terms and conditions. Instead, Petitioner chiefly relied on matters of his own impressions concerning people's motives, an innocuous constructive comment by a Bayer supervisor suggesting Petitioner make eye contact while interacting with group members and receiving instructions, and a statistically incompetent evaluation of the demographics of his work unit. These matters were found inadequate and the District Court entered summary judgment in Bayer's favor on Petitioner' race claims and his derivative public

policy wrongful termination eighth (in part)[4] claim for relief. (App. B at 19-22.)

Petitioner' retaliation (second, seventh and eighth (in part)) claims were found similarly wanting. Petitioner principally relied on the ostensible temporal nexus between his "protected conduct" and Bayer's complained of actions to establish the causal linkage element of his *prima facie* showing, but the more than seven-month passage of time between the filing of his EEOC Charge and the termination of his employment, against the backdrop of numerous intervening events of his own poor job performance, was found by the District Court to foreclose any such inference. Moreover, even had he made his *prima facie* retaliation case, Petitioner was unable to establish a triable issue on the ultimate requisite element of retaliatory motive as against Bayer's unrebutted showing of the performance issues leading directly to his termination. (App. B at 22-24.)[5]

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[4] Petitioner's Eighth Claim for Relief comprises allegations of retaliation and unequal treatment based on "race or color or national origin" in violation of provisions of the California Fair Employment and Housing Act and Article I, section 8, of the California Constitution. Despite the pleading allegation, there was no pursuit by Petitioner of any theory of national origin discrimination or any evidence adduced below in such regard.

[5] As an alternative basis for the grant of summary judgment, the District Court held that Petitioner's untruthful statements about his education on his original employment application would have led to termination under settled Bayer policy, and thus the termination was justified as a matter of law under the so-called "after-acquired evidence rule." (App. B at 24-25.)

D. The Ninth Circuit Affirms

In an opinion filed on December 1, 2008, the Ninth Circuit of Appeals affirmed the District Court's grant of summary judgment. (Appendix A to Petition ("App. A") at 2-4.) The Ninth Circuit affirmed on the discrimination claims, finding there was no triable issue demonstrated concerning Petitioner's claimed acceptable job performance or that others similarly situated, but outside the protected class, had been more favorably treated. (App. A at 2-3.) In addition, Petitioner failed to adduce material, competent evidence of pretext in regards to his retaliation claim and – even had he – he was unable to rebut Respondent's demonstration of numerous legitimate bases for the termination. (App. A at 3-4.) The Ninth Circuit later denied *en banc* review. (Appendix C to Petition.)

REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision in this case does not warrant further review. The decision does not conflict with any decision of this Court or any other courts of appeals. It concerns the proper entry of summary judgment in a garden-variety employment discrimination case and there is nothing exceptional about how the District Court or the Ninth Circuit applied the Federal Rule of Civil Procedure 56 (at times, "Rule 56") standards. On the merits, moreover, the decision is clearly correct; Petitioner cannot show any error with regards to the manner in which his retaliation claims were adjudicated and does not even purport to do so with regards to his discrimination claims. This case is illustrative of exactly why the summary judgment

procedure exists – to avoid wasting judicial resources on trying a case where one party has insufficient evidence. And, such procedure does not run afoul of Seventh Amendment rights to a jury trial.

Moreover, Petitioner's call for re-examination of summary judgment jurisprudence – and implicitly, a judicially-made super-standard under Rule 56 for granting summary judgment in employment discrimination actions - is based largely on the musings of several commentators and a statistical report which reveals no clear signal. There is no demonstrated need for a special summary judgment rule in employment discrimination cases and it would not be the province of this Court to create one.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

There is no circuit split on the standards to be used by federal district courts under Rule 56, and Petitioner does not contend otherwise.[6] (*See* Petition at 26 (relying solely on an asserted need for this Court to exercise its supervisory powers under Supreme Court Rule 10(a).)

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[6] To the extent that Petitioner suggests that there is a more nuanced application of existing summary judgment principles in the Second Circuit, that argument is discussed, *infra*, at II.B.

II. THIS CASE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION, NOR DOES THE NINTH CIRCUIT DECISION DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

A. Summary Judgment Standards Are Well Established and Require no Modification

Petitioner declares a need for this Court to set forth the proper standards to be applied in determining whether to grant summary judgment in employment discrimination cases. (Petition at 25.) But, the summary judgment standards to be applied to any summary judgment motion are entrenched in our jurisprudence and are in no need of revision:

- First, summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c).

- Second, the burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists.

- Third, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought.

- Fourth, the moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.

- Finally, the trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.

See Gallo v. Prudential Residential Services, Ltd. Partnership, 22 F.3d 1219, 1223-24 (2nd Cir. 1994) (citations omitted) ("*Gallo*"). These same criteria were utilized by the District Court in this case when it granted Respondent's motion for summary judgment. (App. B at 11-12.)

As applied to an employment discrimination case in particular, this Court articulated the order and allocation of proof in the seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). The plaintiff bears the initial burden of establishing a *prima facie* case of the alleged discrimination, which has the effect of creating a legal presumption of unlawful discrimination. *Id.* If the plaintiff establishes a *prima facie* case, then

the defendant bears the burden of offering a legitimate nondiscriminatory reason for the adverse employment action. *Id.* If the defendant meets this burden, the presumption created by the *prima facie* case is rebutted, and the burden then shifts back to the plaintiff to show the employer's nondiscriminatory reason for the employment action was a pretext for the alleged unlawful discrimination. *Id.*

Review is unwarranted in this case because the District Court correctly concluded that not only did Petitioner fail to establish a *prima facie* case of discrimination in his employment discrimination claims, neither did Petitioner demonstrate a genuine issue of material fact on the issue of pretext on his retaliation claim. (App. B.) These decisions were reached based on existing and well-defined summary judgment standards as applicable to employment discrimination actions.

B. Second Circuit Jurisprudence Does Not Suggest a New or Different Summary Judgment Standard for Employment Discrimination Cases

Petitioner asserts that summary judgment is granted disproportionately in favor of employers and that the Supreme Court, through its supervisory powers (*see* S. Ct. Rule 10(a)), should accept review in order to ". . . require that the lower courts adopt the Second Circuit's requirement and exercise caution in granting summary judgment when an employer's intent is at issue." (Petition at 27.) Petitioner relies primarily upon *Gallo*, *supra*, 22 F.3d. 1219, to support this argument. The court in *Gallo*, however, in its own words, did

nothing more than "repeat" the same long-standing, and oft-cited, standards governing *every* summary judgment motion, *id.* at 1223-24; the same criteria that were set forth by the District Court in this case. (App. B at 11-12.)

Also in *Gallo*, the Second Circuit cautioned trial courts confronted with a summary judgment motion in the employment discrimination context: "A trial court must be cautious about granting summary judgment to an employer where, as here, its intent is at issue. Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Gallo*, 22 F.3d at 1223-24. Petitioner suggests that review is warranted in order for this Court to "adopt" this cautionary remark made by the Second Circuit.

But this cautionary approach to summary judgment motions in employment discrimination cases is not limited to the Second Circuit. The Ninth Circuit "has set a high standard for the granting of summary judgment in employment discrimination cases." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996). In particular, "[t]he Ninth Circuit has instructed that district courts must be cautious in granting summary judgment for employers on discrimination claims." *See Lam v. University of Hawaii*, 40 F.3d 1551, 1564 (9th Cir. 1994) ("'[w]e require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is

one that can only be resolved through a ["]searching inquiry["] – one that is most appropriately conducted by the factfinder'") (quoting, *Sischo-Nownejad v. Merced Comm. Coll. Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991))."

Moreover, the Supreme Court has already articulated this cautionary approach as applied to summary judgment motions where motive and intent are at issue. "[S]ummary judgment is to be granted with great caution; for 'it is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.'" *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (antitrust litigation) (internal citation omitted); *see also, Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986) (libel action involving First Amendment).

Finally, it is notable that the District Court here specifically referenced the minimal showing required of an employment discrimination plaintiff to survive summary judgment. "At summary judgment, the degree of proof necessary to establish a prima facie case is 'minimal and does not even need to rise to the level of a preponderance of the evidence.' *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) [("*Wallis*")].) Although the burden for establishing a prima facie case is an easy one to satisfy, Plaintiff has failed to do so." (App. B at 14-15.) Thus, Petitioner was not held to an unduly harsh standard that requires revisiting, only to a minimal standard which he failed to meet.

C. Summary Judgment, as with Many Other Procedural Devices Employed By District Courts, Does Not Violate the Seventh Amendment

Petitioner also argues that this Court should accept review in order to exercise its supervisory powers to ". . . emphasize the implications of the Seventh Amendment right to jury trial when deciding summary judgment motions . . . ." (Petition at 27.) Respondent does not dispute that there is a right to a jury trial in any civil rights case where damages are at issue. This right is guaranteed by the Seventh Amendment to the Constitution. To the extent that Petitioner is suggesting that the summary judgment standard under the Federal Rules violates the Seventh Amendment right to jury trial, this Court held long ago that it does not. Indeed, such contentions have been rejected for more than one hundred years. *See Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902); *Burkes v. Wisconsin Dep't. of Transp.*, 464 F.3d 744, 759 (7th Cir. 2006) stating that

> "[t]he Supreme Court has made it abundantly clear that summary judgment has a proper role to play in civil cases, and thus granting summary judgment does not violate a plaintiff's right to due process. We have also stated that summary judgment and Federal Rule of Civil Procedure 56 do not violate the Seventh Amendment, as this argument . . . flies in the face of firmly established law")

(internal citations and quotations omitted).

There have been many procedural devices developed since 1791 which have diminished the civil jury's historic domain and not one of them has been found to violate the Seventh Amendment. *See Galloway v. United States*, 319 U.S. 372, 388-93 (1943) (directed verdict does not violate the Seventh Amendment); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 497-98 (1931) (retrial limited to question of damages does not violate the Seventh Amendment, even though there was no practice at common law for setting aside a verdict in part); *Fidelity & Deposit Co. v. United States*, *supra*, 187 U.S. at 319-21 (summary judgment does not violate the Seventh Amendment); *Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935) (remittitur did not violate Seventh Amendment). Thus, Petitioner's argument that review should be granted in order to emphasize the implications of the Seventh Amendment right to jury trial when deciding summary judgment motions should be rejected as long since moot.

D. Petitioner's Incomplete and Misleading Use of Statistics Does Not Provide an Appropriate Basis for a Grant of Review Here

To support his argument that summary judgment is granted disproportionately to employers, Petitioner relies primarily on statistics recently published by the Federal Judicial Center. *See Report on Summary Judgment Practice Across Districts with Variations in Local Rules* (August 13, 2008) (hereinafter, the "Report"). The data included in the Report, however, were not designed for research into civil justice, litigation theory, or any substantive area of law. T. Eisenberg and M. Schlanger, *The Reliability of the*

Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis, 78 Notre Dame L. Rev. 1455, 1462 (2003). Instead, the data were prepared "as a means of assessing the potential impact of proposed amendments to Rule 56 of the Federal Rules of Civil Procedure" having to do with the potential Rule inclusion of a separate statement of undisputed material facts. *See* the Report at 1. Furthermore, like many large data sets, the Federal Judicial Center data are not completely accurate (*id.* at 1458), and Petitioner's selective citations from the Report are misleading. Petitioner de-emphasizes (by contrasting contract and tort cases), for example, that out of all employment discrimination cases filed, only 11-15% are terminated by summary judgment. *The Report*, Table 12, p. 17. This can only mean that the vast majority of employment discrimination cases either are resolved by a factfinder or settlement.

Furthermore, Petitioner relies upon these statistics to support his argument that this Court should accept review to either (1) reiterate the summary judgment standards for federal district courts, or (2) articulate a new summary judgment standard specifically for employment discrimination cases. Review is not warranted for either reason.

As set forth above, the Rule 56 standards are well established, and to the extent that Petitioner is suggesting Rule 56 be applied differently to employment discrimination cases, or that summary judgment for employment discrimination cases be prohibited or limited in any way, such an argument must be rejected. Modifying the federal rules of civil procedure is not

accomplished by seeking review of a case by the Supreme Court. Instead, such modifications are governed by procedures set forth in 28 U.S.C. sections 2072, 2073, and 2074.

Moreover, Rule 56, along with several other procedural devices (*e.g.*, motions to dismiss for failure to state a claim (Fed. R. Civ. Proc. 12(b)(6)) available to federal district courts, serve the vital role of managing their dockets. The workload of federal district courts has grown substantially in recent decades for the same reasons that have increased demands upon the Supreme Court to hear cases upon appeal. In the two decades between 1971 and 1991, employment law cases saw a staggering 400 percent increase in the federal district courts. *Discharge Is Now Major Focus of Job Discrimination Suits*, Daily Lab. Rep. (BNA) No. 164, at A-3 (Aug. 23, 1991). Between 1990 and 1998, the number of employment civil rights claims increased by an additional 300 percent. Marika F. X. Litras, Ph.D., *Civil Rights Complaints in U.S. District Courts, 1990-98*, NCJ 173427, Jan. 2000, at 2. It is no secret that employment-related litigation has increased by an astonishing rate throughout the last three decades and currently represents a significant portion of the federal judicial caseload. In 2002, for example, employment litigation represented nearly 14 percent of the more than one-quarter million cases filed in United States District Courts. *See*, Office of Human Resources and Statistics, Administrative Office of the United States Courts, Federal Judicial Caseload Statistics March 31, 2002, at 44-46 (2002).

Given the multitude of employment discrimination cases filed each year, summary judgment continues to be an important procedural tool for district courts to help manage their ever-increasing docket. Indeed, the Report stands for no contrary proposition and, if, as Petitioner suggests (though the Report does not necessarily bear this out), summary judgment is granted more frequently in employment discrimination cases versus run-of-the mill common law contract and tort claims, it may well be argued that the statistics *prove*[7] that the latter are more likely to have merit, or at least factual disputes at their core.

E. Supreme Court Review Is Not Intended to Correct Factual Errors in Lower Court Decisions

Petitioner failed to convince the District Court and the Ninth Circuit that his case had any merit. The within Petition is simply seeking a "third bite at the apple." But, this is not an appropriate basis for Supreme Court review.

> "The function of this Court is not primarily to correct factual errors in lower court decisions, but instead to resolve important questions of federal law and to exercise supervisory power over lower federal courts. Our institutional role properly is focused on ensuring clarity and uniformity of legal doctrine, and not on the case-specific process of reviewing the

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[7] As Mark Twain is oft-quoted as saying, "There are lies, damned lies and statistics."

> application of law to the particularized facts of individual disputes – one of the functions performed quite capably by the federal courts of appeals."

U.S. v. Young, 470 U.S. 1, 34 (1985).

Petitioner here improperly seeks review by the Supreme Court to correct perceived factual errors made by both the District Court and the Ninth Circuit Court of Appeals. This request should be denied.

III. THE LOWER COURTS CORRECTLY APPLIED LONG-STANDING LAW TO THE FACTS BELOW IN GRANTING SUMMARY JUDGMENT

The decisions of the District Court and the Ninth Circuit below not only do not implicate a circuit split or call for a re-examination of summary judgment principles insofar as employment discrimination cases are concerned, they were correctly decided.

A. Petitioner Does Not Even Assign Error Concerning the Disposition of his Discrimination-Based Claims

The District Court determined that Petitioner had not raised a *prima facie* case of employment discrimination because he was not able to establish a triable issue of fact as to whether (a) he was performing work in a manner acceptable to Respondent, and (b) others outside of the protected class, but otherwise similarly situated, were treated more favorably. (App.

B at 14-18.) Even had Petitioner created a triable issue under his *prima facie* case, the District Court further determined that Petitioner could not establish a triable factual question on the ultimate issue of discriminatory intent, where he could not rebut with substantive, competent evidence that Respondent terminated Petitioner's employment on account of an escalating series of performance issues. (App. B. at 19-22.) The Ninth Circuit affirmed, finding no triable issue created on Petitioner's discrimination claims. (App. A at 2.)

In his Petition, Petitioner tacitly concedes the propriety of the lower courts' summary disposition of his discrimination claims. Petitioner states that "[t]he present case exemplifies the need for review of the question of whether summary judgment is being used improperly and the (*sic.*) for the establishment of the standards for its use . . . ," but does so exclusively by "focus[ing] on the decision of the lower courts on the issue of retaliation." (Petition at 27.) Thus, no error by the lower courts is urged by Petitioner concerning his discrimination claims in seeking Supreme Court review.

B. The Lower Courts Correctly Held that Petitioner Had Not Adduced Sufficient Evidence to Sustain his Retaliation-Based Claims

In focusing on the issue of retaliation, Petitioner's central contention is that the District Court erroneously granted summary judgment and violated Rule 56 standards (and relevant jurisprudence) by improperly weighing conflicting evidence and deciding matters of disputed fact. The Ninth Circuit rejected these same

contentions and, as noted above, Supreme Court review is not appropriate to simply give Petitioner a third chance to convince a court that a triable factual issues exists in this instance. Further, the ostensible errors pointed to by Petitioner are not that at all; but instead comprise misstatements or misunderstandings of the record and non-material factual discrepancies not warranting trial.

1. The District Court Did Not Err in Determining that Proximity Evidence Alone Was Insufficient to Create Triable Issue on Respondent's Supposed Retaliatory Intent

Petitioner chides the District Court for overlooking or ignoring evidence that Petitioner had raised a prior discrimination charge in a Union grievance that preceded his termination by a matter of weeks, and had been criticized at a Union-conducted meeting by co-workers very shortly before his termination. The District Court determined that the significant passage of time – more than seven months – between Petitioner's initial filing of his EEOC Charge and his employment termination – precluded a finding of causal nexus on this basis. (App. B at 23-24; citing, *inter alia*, *Manatt v. Bank of America*, 339 F.3d 792, 808 (9th Cir. 2003) ("*Manatt*") (holding that nine-month period of time between protected activity and alleged retaliatory conduct was too long to create an inference of retaliation).) From this, Petitioner concludes the District Court erred in finding that too much time had passed between Petitioner's legally protected activity and his termination to raise a triable issue on the basis of so-called proximity evidence.

But, the grievance did not constitute additional protected activity (beyond the EEOC Charge); it merely referenced pending protected conduct. More particularly, in grieving the three-day suspension imposed upon Petitioner by Respondent for (a) his failure to appear for work for an important, time-controlled maintenance procedure (because he did not feel as if he should have to do so); and (b) his working of unauthorized overtime, Petitioner wrote as to the nature of his grievance: "Vindictive behavior transpired from *a pending EEOC charge* prompt (*sic*) from the violation of Title VII." (ER/412 (emphasis supplied).) Thus, there was no additional protected conduct on which to predicate a temporal argument.

Even more pertinently, the grievance *followed* the disciplinary action by Respondent. In order to circumstantially establish the necessary element of causation on a retaliation claim, the protected conduct must *precede* the employer's challenged disciplinary action. Temporal proximity is established by showing a close linkage in time of an adverse action *following* on the heels of protected conduct. *See Manatt*, *supra*, 339 F.3d at 802. With regards to Petitioner's referenced grievance, the converse was the case – first, Respondent imposed discipline (the suspension) and only then did Petitioner re-raise the issue of his then pending EEOC Charge. In a related vein, the supposed co-worker harassing comments were not protected activity (at least not on Petitioner's part) and thus there is no relevance on the issue of proximity regarding Respondent's supposed retaliatory intent.

Moreover, Petitioner continues to misapprehend the temporal proximity analysis at its threshold. As the Ninth Circuit has stated, temporal proximity is not itself an element of the *prima facie* retaliation case but, rather, evidence upon which an inference of causation may be drawn. *Porter v. California Dept. of Corrections*, 419 F.3d 885, 895 (9th Cir. 2005). Thus, any bright line rule on temporal proximity has been rejected and, instead:

> "Whether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the timing and the surrounding circumstances. In some cases, the totality of the facts may form such a clear picture that a district court would be justified in granting summary judgment, either for or against a plaintiff, on the issue of retaliatory motive; but the length of time, considered without regard to its factual setting, is not enough by itself to justify a grant of summary judgment."

Coszalter v. City of Salem, 320 F.3d 968, 978 (9th Cir. 2003).

Here, the record reflects that Petitioner had pending an EEOC Charge for more than half of 2002, but yet there was a series of escalating performance deficiencies in January 2003 – effectively unrebutted in the record – which preceded and precipitated Respondent's termination of Petitioner's employment. Accordingly, the finding that Petitioner had failed to demonstrate *prima facie* causation by timing evidence alone was proper here. *See Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 731 (9th Cir. 1986) (timing

evidence alone is not enough to withstand summary judgment where employer has a legitimate stated basis for its challenged actions).

2. The Ninth Circuit Did Not Commit Reversible Error in its Characterization of Richard Smith's Role in the Union Meeting/Termination Process

Petitioner also assigns error to the Ninth Circuit in its reference to the lack of any evidence in the record that Petitioner's former supervisor Richard Smith (a) made any affirmatively hostile comments at a referenced Union meeting, and (b) communicated what occurred at that meeting to other members of the management team involved in the decision to terminate Petitioner. (App. A at 3.) But, Petitioner points to no conflicting evidence on these issues, only different facts, *i.e.*, that Smith ostensibly agreed with criticisms of Petitioner as voiced at the meeting and himself was involved in the termination decision. Ultimately, however, the District Court (App. B at 24) and Ninth Circuit (App. A at 3-4) determined that there was no competent evidence to rebut that Respondent acted to terminate based on the performance issues raised, and the past record of discipline. Indeed, the Ninth Circuit specifically found that "[g]iven these legitimate and particularized bases for termination, the fact that one of [Petitioner's] supervisors *participated* in a single allegedly hostile union meeting is insufficient evidence of pretext to survive summary judgment." (App. A at 3-4 (emphasis supplied).) Thus, whether a *prima facie* retaliation case was originally raised is of no moment and does not justify a grant of review by this Court.

3. The District Court Did Not Err in Ignoring Supposed Factual Conflicts in Record in Granting Summary Judgment on Petitioner's Retaliation Claims

Petitioner re-raises in his Petition six instances where he claims the District Court ignored or disregarded supposedly competent evidence on the issue of pretext. But, these instances do not bear scrutiny.

1. Petitioner states there was an evidentiary conflict as to whether he was asked about (or whether there was adequate investigation of) his state of mind in terms of his misstatements on Respondent's production documents. HR Manager Joe Gallagher stated an inquiry would have typically been posed of an employee who would be permitted to provide his "side of the story." The undisputed evidence of record, however, is that Smith did ask Petitioner if he changed the filters and Petitioner stated he had done so. (ER/534-535.) Thus, there is no question that Petitioner completed the Respondent's production paperwork erroneously, which was one of the reasons he was terminated as recognized by the District Court. (App. B at 10.) It is not clear how this amounts to a conflict or evidence of pretext in the record.

2. Petitioner states there were also "[c]onflicts" as to who "checked up on his work" on January 24, 2003. (Petition at 30.) In fact, there was no material conflict. Co-worker James Jewell never testified that he "inspected" the work. He testified that Smith told him to take pictures, replace the filter, and copy the logbook

– none of which would make any sense if Smith had not already inspected the work and determined that it had not been completed by Petitioner, as Smith testified he had done. (ER/184:10-186:7.) On the very narrow issue of who actually took certain of the pictures as between Smith and Jewell, even if the testimony were in conflict, it does not serve to create a triable material factual issue on the matter. It is axiomatic that in the face of an employer's properly supported summary judgment motion, the plaintiff may not avoid summary disposition by pointing to minor or immaterial discrepancies in the employer's evidence. *See, e.g., Fogerty v. MGM Group Holdings Corp.*, 379 F.3d 348, 353 (6th Cir. 2004) ("[a] nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations. Instead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment").

3. Petitioner states there are testimonial conflicts as to whether he was ever asked about the filter job. As stated above, there were not; at least not of a material nature.

4. Petitioner states he believes he changed all of the filters and he denies making deliberate misstatements on production documents. Even leaving aside the admissibility of the cited Petitioner's self-serving declaration testimony in this regard (as contradicting his own prior deposition testimony (*see* App. B at 16-17, n. 2 (evidence excluded by District Court on the basis of this impermissible conflict)), the issue is collateral. The question is not whether Petitioner

actually did engage in the charged misconduct, it is whether Respondent believed that he had done so. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (irrelevant on issue of pretext whether employee improperly left post as was contended by employer as basis for termination; relevant issue was employer's uncontroverted conclusion that employee had done so). Petitioner has adduced no competent evidence to dispute Respondent's evidence of such convictions.

5. Petitioner states there is a conflict over whether he was ever told by Gallagher to get permission from his supervisor to come meet with him (Gallagher) on the date in question. Petitioner does not, however, refute Gallagher's testimony that he (Petitioner) told Gallagher that he had received supervisor permission (ER/409:2-11), but had not in fact received such permission. (ER/461.) Further, the imagined testimonial conflict here is not material as the issue for Respondent was the undisputed fact that Petitioner had left a job assignment without supervisor approval.

6. Finally, Petitioner states that his supposed struggles to get into and accepted in the HVAC Department are relevant to the issue of retaliatory intent on Respondent's part and a jury should be permitted to "conclude that [he] was seen as a malcontent and trouble-maker who should be gotten rid of because of his co-workers' anger and hostility." (Petition at 32.) But, a triable issue may only be created by admissible evidence. *See* Fed. R. Civ. Proc. 56(e); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995) (only competent evidence is to be

considered in opposition to summary judgment). Petitioner cannot create such an issue by speculating concerning the actions of others. *See Wallis*, *supra*, 26 F.3d at 890 (upon employer's legitimate showing, to defeat summary judgment, plaintiff must then produce "specific, substantial evidence of pretext"); *Lindahl v. Air France*, 930 F.2d 1434, 1437-38 (9th Cir. 1991) ("plaintiff cannot carry [the *McDonnell Douglas*] burden simply by restating the prima facie case and expressing an intent to challenge the credibility of the employer's witnesses on cross-examination.") It was not error for the lower courts to reject such an argument in opposition to summary judgment here.

All told, even were this Court to determine that a demonstration of error below were alone a proper basis for review, Petitioner has failed to make any such showing.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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